Supreme Court, U.S.
FILED

97 653 AUG 11 1997

OFFICE OF THE CLERK

No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1997

NANCY M. ORESKOVICH,

Petitioner,

v.

OUR LADY OF LOURDES HEALTH CENTER, and
EUGENE F. FAIRBANKS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Thomas M. Malee
Attorney at Law
1109 N. 22nd Street
Billings, Montana 59101
(406) 245-8304

Attorney for the Petitioner

Press of Printmaster, Billings, Montana (406) 252-5727

30 P

QUESTION PRESENTED

1. Whether due process requires notification to parties who file untimely notices of appeal, in view of Rule 4(a)(5) of the Federal Rules of Appellate Procedure?

TABLE OF CONTENTS

	Page
INTRODUCTION	1
OPINIONS BELOW	2
JURISDICTION	2
STATUTES, TREATIES, OTHER AUTHORITY	2
STATEMENT OF THE CASE	3
ARGUMENT	3
REASONS FOR GRANTING THE WRIT	3
1. There is Conflict among the Circuits	3
2. Violation of Due process	4
3. Unique Circumstances Doctrine	6
CONCLUSION	7

TABLE OF AUTHORITIES

Carlisle v. U.S, (1996) 116 S.Ct. 1460	7
Kinsella v. U.S, 361 U.S. 234, 80 S.Ct. 297	5
People v. Tahoe Reg. Planning Authority, (9th 1985) 766 F.2d 1316	6
Thompson v. Immigration and Naturalization Service, (1964) 375 U.S. 384, 84 S.Ct. 397	2, 6
U.S. v. Salerno, (1987) 481 U.S. 759, 107 S.Ct. 2095	4
Winter v. Barrett, 352 Ill 441, 186 NE 113	5

STATUTES AND RULES

Rule 4, Federal Rules of Appellate Procedure	2, 4, 5, 6, 7
28 U.S.C. Section 1254	2
28 U.S.C. Section 1331	2
28 U.S.C. Section 1367	2

MISCELLANEOUS

Federal Procedure, Vol. 2A, Appeal, Sec. 3:534	4

No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1997

JILL MILLION HAYES, and JEANNE HAYCRAFT,
Plaintiffs,

and

NANCY M. ORESKOVICH,
Petitioner,

v.

OUR LADY OF LOURDES HEALTH CENTER, and
EUGENE F. FAIRBANKS,

Respondents.

PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Petitioner was the attorney for Plaintiffs Hayes and Haycraft in this action which sought damages for unlawful radioactive experimentation performed upon the Plaintiffs by Defendant Hospital and physician in the 1950's. The action was brought in the Federal District Court for the Eastern District of Washington. When a funding counsel reneged and did not enter the case, defense counsel asked the Plaintiffs to voluntarily dismiss their case. Upon the advice of the Petitioner, they agreed to dismiss without prejudice, reserving the right to refile if further funding and documentary evidence could be found. However, after a

stipulation to dismiss had been prepared, the Plaintiffs changed their minds, and refused to dismiss. The Petitioner then twice sought permission to withdraw from the case. The Plaintiffs consented to Petitioner's withdrawal. However, the district court denied the Petitioner's requests to withdraw, and ordered Petitioner to continue representing the Plaintiffs.

Accordingly, the Petitioner resisted motions for summary judgment which had been filed by the Defendants. The district court then granted the motions for summary judgment, and granted Rule 11 sanctions against the Petitioner for resisting those motions, i.e. for obeying the court's order.

The Petitioner appealed the sanction order to the Ninth Circuit Court of Appeals, which dismissed the appeal on the grounds that it was untimely. After a motion for Reconsideration was denied, the Petitioner petitions this Court for a Writ of Certiorari.

OPINIONS BELOW

The opinions below are reproduced as APPENDIX B, C and D of Petitioner's Appendix.

JURISDICTION

The Petitioner has invoked the jurisdiction of this Court pursuant to 28 U.S.C. Section 1254(1) which allows this Court to review cases in the Courts of Appeals by Writ of Ceriorari granted upon the petition of any party to any civil case before or after rendition of judgment or decree. The district court had jurisdiction pursuant to 28 U.S.C. 1331 and 1367.

The Petitioner seeks review of the Appellate Court's dismissal of her appeal, and denial of her Motion for Reconsideration of that decision which was entered on May 14, 1997.

STATUTES, TREATIES AND OTHER LAWS INVOLVED

This case involves the due process clause of the U.S. Constitution, Rule 4 of the Federal Rules of Appellate Procedure, Rule 4(a)(5), F.R.A.P, and the 'unique circumstances' Doctrine, as

set forth by this Court in *Thompson v. Immigration and Naturalization Service*, (1964) 375 US 384, 84 S.Ct. 397, and subsequent decisions.

STATEMENT OF THE CASE

The Plaintiffs brought suit against the Defendant Hospital and doctor for damages resulting from illegal and unauthorized radioactive experimentation upon the Plaintiffs. After some depositions, a funding counsel reneged upon an agreement and refused to come into the case on behalf of Plaintiffs, making it financially impossible for Plaintiffs to continue. Defense counsel asked that the Plaintiffs voluntarily dismiss. Upon the advice of Petitioner, the Plaintiffs agreed to dismiss without prejudice, reserving the right to refile when funding and further documentary evidence could be found. However, the Plaintiffs changed their minds against the advice of the Petitioner. The Petitioner then sought leave of court twice to withdraw from the case. The Plaintiffs consented to the withdrawal.

The court denied the motions to withdraw, and ordered the Petitioner to continue representing the Plaintiffs. Obeying the orders, the Petitioner resisted defense motions for summary judgment. The court then granted the summary judgment motions, and granted Rule 11 sanctions against the Petitioner for resisting the motions, i.e. the court sanctioned the Petitioner for obeying the court's order.

Judgment was entered against the Petitioner on December 10, 1996, in the amount of $13,332.45. On January 13, 1997, the Pro Se Petitioner filed her Notice of Appeal. This was 34 days after entry of judgment. That same day, the Clerk of the district court sent a letter to Petitioner acknowledging receipt of the Notice, and providing instructions for the ordering of transcripts. (Appendix A) On March 13, 1997, the Ninth Circuit Court of Appeals dismissed the appeal as being untimely filed. (Appendix B) The Petitioner sought reconsideration, which was denied on May 14, 1997. (Appendix C) The Petitioner now petitions for a Writ of Certiorari.

SUMMARY OF ARGUMENT

Due process requires that the right granted under Rule 4(a)(5), FRAP, be afforded to all appellants. There is presently a conflict among the Circuits concerning the application of this right. Two Circuits routinely screen filings for timeliness, and promptly notify late filers. The other Circuits do not. When a late filer is not afforded the right granted under Rule 4(a)(5), the unique circumstances doctrine must be applied to deem the appeal timely

ARGUMENT

REASONS FOR GRANTING THE WRIT

1. THERE IS PRESENTLY A CONFLICT IN APPELLATE PROCEDURE AMONG THE CIRCUITS WHICH AFFECTS DUE PROCESS RIGHTS, AND WHICH THIS COURT MUST RESOLVE.

At issue is whether courts and their clerks have a duty to notify litigants of untimely Notices of Appeal, thus allowing them to avail themselves of the saving provision of Rule 4(a)(5), Federal Rules of Appellate Procedure, which allows appellants to seek an extension of time in which to file a Notice of Appeal. The Second and Eighth Circuits routinely screen Notices of Appeal for timeliness, and advise those litigants who file untimely Notices so that they can avail themselves of Rule 4(a)(5). (2A *Federal Procedure,* Appeal, Certiorari, and Review, Section 3:534)

The Ninth Circuit does not have such a procedure, as shown by this case, nor do the other Circuits. At present, only the Second and Eighth Circuits ensure that all appellants have the benefit of Rule 4(a)(5). Since the protection of the law, including Rule 4(a)(5), must be available to all equally, due process requires that all Circuits screen Notices of Appeal for timeliness.

The Second and Eighth Circuits have proven that such procedures are not burdensome or costly. It is estimated that this issue affects less than one percent of all appeals filed. However,

the present denial of due process to that one percent has overriding importance, and must be corrected.

2. DUE PROCESS REQUIRES NOTIFICATION OF PARTIES WHO FILE UNTIMELY NOTICES OF APPEAL, BECAUSE OF RULE 4(a)(5) OF THE FEDERAL RULES OF APPELLATE PROCEDURE.

The due process clause of the Fifth Amendment to the United States Constitution protects individuals against two types of government action: (1) 'Substantive' due process prevents the government from engaging in conduct that (a) shocks the conscience, (b) or interferes with the rights implicit in the concept of ordered liberty; and (2) even if government action depriving a person of life, liberty or property survives substantive due process scrutiny, 'procedural' due process requires that such government action be implemented in a fair manner. (United States v. Salerno, (1987) 481 US 759, 107 S.Ct 2095, on remand (CA2) 829 F.2d 545)

Due process has to do with the denial of fundamental fairness, shocking to the universal sense of justice; it deals neither with power nor with jurisdiction, but with their exercise.(Kinsella v. United States, 361 US 234, 80 S.Ct 297)

In it's broadest sense, due process means that every citizen shall hold life, liberty, property, and immunities under the protection of the general rules which govern society. A general law administered in it's legal course according to the form of procedure suitable and proper to the nature of the case, conformable to the fundamental rules of right, and affecting all persons alike, is due process of law. (Winter v. Barrett, 352 Ill 441, 186 NE 113)

Rule 4, FRAP, was amended to include subsection 4(a)(5) which provides an additional thirty days in which a party can seek an extension of time to file a Notice of Appeal, if that party has missed the time for filing.

In certain cases, such as those in the present case, a party may file a late Notice, but for various reasons, believe it to be timely filed. Unless the court (or court's clerk) notifies the party of the

late filing, the saving period of Rule 4(a)(5) will elapse, and the party will be deprived of that benefit conferred by law.

Two Federal Circuits, the Second and Eighth, have recognized this problem, and instituted procedures to make sure that every late filer is notified that the filing is late, and thus, has the opportunity to avail himself of the saving period. The other Circuits do not have such procedures.

Due process requires that all parties be treated alike, and that the laws be administered fairly. At the present time, parties who unknowingly file untimely Notices of Appeal are deprived of the benefits of Rule 4(a)(5), FRAP, except in the Second and Eighth Circuits. This violates due process.

The Second and Eighth Circuits have proven that it is possible and practical to screen filings for timeliness, and thereby guarantee late filers the benefits of the saving period provided by Rule 4(a)(5). The other Circuits do not screen filings, do not notify late filers of untimeliness, and thus deprive unknowing late filers of due process by depriving them of the benefits of 4(a)(5). This denial of due process can easily be prevented.

3. WHEN A PARTY IS DENIED DUE PROCESS BY BEING DEPRIVED OF THE BENEFITS OF RULE 4(a)(5), FRAP, THE APPEAL MUST BE ALLOWED BY INVOCATION OF THE 'UNIQUE CIRCUMSTANCES' DOCTRINE.

This Court established the 'unique circumstances' doctrine in *Thompson v. Immigration and Naturalization Service,* (1964) 375 US 384, 84 S.Ct 397, to allow a Court of Appeal to decide appeals, even though untimely filed, when some action of the courts had mislead the party into filing a late Notice of Appeal. Under 'unique circumstances,' the Appellate Court retains jurisdiction, though the Notice of Appeal was not timely filed. The doctrine has been subsequently narrowed to apply only to those situations where the court affirmatively misleads the party into believing the Notice is timely.

In this case, the Petitioner filed her Notice of Appeal thirty-four days after entry of judgment. The Clerk of Court immediately sent her a letter which, by any interpretation, assured her that

everything was in order.(Appendx C) The letter included instructions for ordering transcripts, a step which would not have been necessary if the Notice was untimely.

Following this Court's decision in *Thompson,* supra, the Ninth Circuit employed the 'unique circumstances' doctrine in *People v. Tahoe Regional Planning Authority,* (9th 1985) 766 F.2d 1316. In *Tahoe,* the lower court issued a verbal order. The Appellant waited for the order to be reduced to writing, but it never was. Thirty one days after the verbal order, the Appellant appealed. Over an objection that the Notice of Appeal was untimely, the Ninth Circuit held that the facts were unique enough to 'fit within the ambit of the doctrine.'(at 1318)

Importantly, in *Tahoe,* it was immaterial whether the appellant could have shown the excusable neglect or good cause required by 4(a)(5), FRAP. The simple denial of any opportunity to apply for an extension under that rule constituted the unique circumstances which require the Notice to be held timely.

This Court defined the 'unique circumstances' doctrine again last year when it said 'unique circumstances' exist when 'the cause of the failure to meet the Rule's deadline was an erroneous ruling or assurance of the District Court itself.' (*Carlisle v. U.S,* (1996) 116 S.Ct. 1460, at 1467) It cannot be denied that the clerk is an extension and officer of the district court. When the action of the court, or it's officers, denies an appellant his right under Rule 4, this Court requires the appeal to be deemed timely. Due process requires the same result when the court, or it's officers, deny an appellant his right under Rule 4(a)(5). The latter rule is no less binding than the former, and it's provisions must be afforded to all to comply with due process.

CONCLUSION

The Petitioner unknowingly filed a late Notice of Appeal. If the Notice had been filed in the Second or Eighth Circuits, the Petitioner would have been notified of the untimeliness, and would have been able to seek an extension under Rule 4(a)(5). Because the Notice was filed in the Ninth Circuit, the Petitioner was not notified that the notice of appeal was late, until long after the

period allowed by Rule 4(a)(5) had elapsed, and was thereby denied the right granted under that rule, in violation of due process. The right granted by the rule is routinely afforded to appellants in the Second and Eighth Circuits.

The clerk's letter to the Petitioner, instructing her to order transcripts, could only be interpreted as an assurance that the appeal was timely. Had the clerk not so responded, the Petitioner would likely have been alerted to check timeliness.

When the conduct of a district court denies an appellant his right to appeal under Rule 4, i.e. his due process right, this Court applies the 'unique circumstances' doctrine to deem the appeal timely. When the conduct of a district court, or it's officers, denies an appellant his right to seek an extension of time under Rule 4(a)(5), i.e. his due process right, the unique circumstances doctrine must also be applied to deem the appeal timely. Due process requires it.

The Second and Eighth Circuits already guarantee the benefits of Rule 4(a)(5) to appellants by notifying them of late appeals, and thereby afford them due process. The other Circuits must be required to do the same. This Petition must be granted, and the lower court's decision reversed.

DATED this 10th day of October, 1997.

Respectfully submitted,

Thomas M. Malee
Attorney at Law
1109 N. 22nd Street
Billings, Montana 59101
(406) 245-8304

Attorney for the Petitioner

APPENDIX A

(SEAL)

United States
District Court
Eastern District of
Washington Office
Of the Clerk

James R. Larsen
Clerk

January 13, 1997

Ms. Nancy Malee Oreskovich, Esq.
4128 South Hatch
Spokane, Washington 99203

Re: Hayes, et al. v. Our Lady of Lourdes, et al.
CS-95-423-WFN

Dear Ms. Oreskovich:

Enclosed find a copy of the Notice of Appeal and docket entries. In addition, a Transcript Designation and Ordering form is included for each reporter/recorder involved in the case. Specific instructions for the designation (form CA9-036) are at the bottom of the form.

The designation form must be completed in full including the name and date of each proceeding and the court reporter's name who reported the proceeding. The docket entries enclosed provide the dates of the hearings and the court reporter's name who reported the proceeding. "Entire transcript," "Entire trial," or "All proceedings" is not sufficient information to process your transcript order.

TRANSCRIPTS FILED PRIOR TO APPEAL:

If a hearing transcript has been filed prior to the appeal you should designate the transcript, if you are considering it to be a part of the record. Also, please indicate on the

transcript and designation form that the transcript has already been filed.

Thank you for your assistance. If you have any questions, please call.

Very truly yours,
(signed)
Virginia L. Reisenauer
Appeal Case Administrator

vr
Enclosures

920 West Riverside, Room 840, P.O. Box 1493 *
Spokane, Washington 99210
(509) 353-2150 * FAX (509) 353-2394

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
Mar 27, 1997
Cathy Catterson, Clerk
U.S. Court of Appeals

JILL MILLION HAYES, et al,.
Plaintiffs,
NANCY ORESKOVICH,
Appellant,
-vs-

OUR LADY OF LOURDES HEALTH CENTER, Kennewick, WA,
Defendant-Appellee

No. 97-35062

DC# CV 95-423-WFN
Eastern Washington
(Spokane)

ORDER

Before: SNEED, FARRIS and THOMAS, Circuit Judges

The district court entered judgment on December 10, 1996. Appellant filed the notice of appeal on January 13, 1997. Accordingly, appellee's motion to dismiss this appeal for lack of jurisdiction is granted. See Fed.R.App.P. 4(a)(appeal must be filed within 30 days after entry of judgment)

mocal/3.24.97/ka

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
May 14, 1997
Cathy Catterson, Clerk
U.S. Court of Appeals

JILL MILLION HAYES, et al,.
Plaintiffs,
NANCY ORESKOVICH,
Appellant,
-vs-

OUR LADY OF LOURDES HEALTH CENTER, Kennewick, WA,
Defendant-Appellee

No. 97-35062

DC# CV 95-423-WFN
Eastern Washington
(Spokane)

ORDER

Before: SNEED, FARRIS and THOMAS, Circuit Judges

Appellant's motion for reconsideration of the court's March 27, 1997 order dismissing this case for lack of jurisdiction is denied.

misc/5.97/97.35062

APPENDIX D

FILED IN THE
U.S. DISTRICT COURT
Dec 10, 1996
James R. Larsen, Clerk
_____Deputy

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JILL MILLION HAYES, individually and on behalf of a deceased child, and JEANNE HAYCRAFT, Plaintiffs, -vs- LADY OF LOURDES HOSPITAL, Kennewick, WA, and VIRGINIA MASON HOSPITAL, Seattle, WA, and EUGENE F. FAIRBANKS, M.D. Bellingham, WA, Defendants.	No. CS-95-0423-WFN ORDER

INTRODUCTION

Two telephonic motions hearings were held on November 26, 1996. An initial telephonic conference was held at 8:30 a.m. During this first conference call, Kirk Ehlis and Mark Watson participated on behalf of Defendant Our Lady of Lourdes Hospital; Steve Henley participated on behalf of Defendant Fairbanks; Plaintiffs Jill Hayes and Jeanne Haycraft participated pro se after informing the Court that they had fired their counsel, Nancy Oreskovich, and no longer wished to be represented by her. Nancy Oreskovich could not be reached for the initial conference call.

During the first conference call, the Court considered Plaintiffs' Motion for Reconsideration, filed November 8, 1996, prepared by their former attorney, Nancy Oreskovich. Additionally, Plaintiffs requested that this Court grant a continuance prior to ruling on the Motion for Reconsideration. In the alternative, Plaintiffs requested that the Court dismiss their claims without prejudice rather than with prejudice. The Court, finding no basis in either law or fact for Plaintiffs' contentions, denied both the written Motion for Reconsideration and Plaintiffs' additional oral motions.

A second conference call was commenced at approximately 9:00 a.m. Kirk Ehlis and Mark Watson participated on behalf of Defendant Our Lady of Lourdes; Steve Henley participated on behalf of Defendant Fairbanks; also participating were Plaintiffs Hayes and Haycraft and Attorney Nancy Oreskovich.

During the second conference call, the Court considered the issue of sanctions against Attorney Nancy Oreskovich pursuant to Fed.R.Civ.P 11 and 28 U.S.C. 1927. After considering the written submissions of the parties as well as the arguments presented during the telephonic conference, the Court concluded that Attorney Oreskovich's actions in this case merited sanctions under both Fed.R.Civ.P. 11 and 28 U.S.C. 1927. As required by both Rule 11 and Section 1927, the Court made, on the record, explicit oral findings regarding the conduct of Ms. Oreskovich whcih merited sanctions. The Court then ordered that Defendants' fees and costs incurred after the filing of summary judgment motions should be assessed against Attorney Oreskovich as sanctions. This Order is entered to memorialize and supplement the oral findings of the Court.

FACTUAL BACKGROUND

APPENDIX D

On October 12, 1995, Attorney Oreskovich, on behalf of the Plaintiffs, filed a detailed 28 page Complaint in the above-captioned matter. The Complaint alleged that the Defendants in this action had engaged in grave and reprehensible conduct. Specifically, the Complaint noted that "(h)alf a century ago, at the very same time that United States attorneys and judges were prosecuting and convicting German doctors for human experimentation upon innocent persons without their consent, the defendants subjected innocent citizens of the United States to disturbingly similar inhumane and outrageous involuntary human experimentation..." (Compl. Sec. 1) The Complaint went on to allege that the Defendants in this case knowingly and maliciously injected Plaintiff Jill Million Hayes with radioactive substances while she was pregnant with Plaintiff Jeanne Haycraft.

In the Complaint, Plaintiffs contended that the daily injections of radioactive substances had caused injury to Plaintiffs Hayvraft and hayes and had caused the death of Thomas Million, another child of Plaintiff Hayes. Accordingly, Plaintiffs sought damages under the following causes of action: (1) civil responsibility for crimes against humanity; (2) violation of constitutional and civil rights; (3) fraud/deceit; (4) intentional infliction of bodily harm and emotional distress; (5) strict liability for inherently dangerous activities; (6) personal injury caused by exposure to toxic substances; (7) absence of informed consent; (8) wrongful death; (9) negligence; and (10) negligent misrepresentation.

The specific factual allegations supporting Plaintiffs' contentions are detailed in plaintiffs' Complaint and in their response to Defendants' summary judgment pleadings. In brief, Plaintiffs outline the following series of events. Plaintiffs allege that Plaintiff Hayes, while pregnant with plaintiff Haycraft, sought treatment from Dr. Fairbanks in the fall of 1951 during the fourth month of pregnancy.

Plaintiffs allege that Plaintiff Hayes received injections every day for a period of twelve weeks. After the injections began, Plaintiff Hayes recalls suffering nausea, vomiting, flank pain, bleeding sores, diarrhea, and hair loss.

When Plaintiff Hayes gave birth to plaintiff Haycraft at Our Ladt of Lourdes hospital, Haycraft had a congenital condition known as a thyroglossal cyst on her throat. Plaintiffs allege that no one from the hospital told hayes about the cyst, and that she discovered the cyst upon bringing the child home from Our Lady of Lourdes. Ultimately, Defendant Fairbanks advised Hayes that the cyst would have to be removed. When haycraft was 11 months old, Hayes took her to Dorn Becker hospital in Portland to have the cyst removed.

Plaintiffs apparently became convinced that they were the victims of radioactive experimentation after learning of a study conducted at Vanderbilt University and a secret study called the 'Hanford Congenital Malformation Case Control Study, 1944 to 1986." Hayes noted that the Vanderbilt study was conducted on welfare recipients and that the recipients were told that they were ill and given radioactive injections under the guise of vitamin B shots. Recalling that she, like the Vanderbilt subjects, was on welfare at the time she received the shots, was told that she was deathly ill, and was told that the shots were vitamin B, Hayes speculated that she had been a victim of radioactive experimentation conducted jointly by Defendants Fairbanks, Virginia Mason Hospital and Our Lady of Lourdes.[1] Plaintiffs concluded that the radioactive injections were the cause of the maladies they suffered.

1. Plaintiffs voluntarily dismissed their claims against Defendant Virginia Mason Hospital on February 22, 1996.

APPENDIX D

PROCEDURAL BACKGROUND

Plaintiffs retained Attorney Nancy Oreskovich and filed their complaint on October 12, 1995. The parties filed a joint status conference certificate on January 29, 1996. On February 8, 1996, this Court held an initial telephonic status conference, and ordered a preliminary round of discovery.

On February 26, 1996, the parties stipulated to the dismissal with prejudice of Defendant Virginia Mason Hospital.

On May 1, 1996, Defendant Our Lady of Lourdes filed it's Motion for summary judgment. This Court conducted a second telephonic status conference on May 3, 1996. At the telephonic conference, the Court set a briefing schedule for summary judgment motions as follows: (1) Defendant Fairbanks was ordered to file his motion for summary judgment no later than May 27, 1996; (2) Plaintiffs were ordered to file their responses to Defendants' Motions for Summary Judgment by June 14, 1996; (3) Defendants' reply briefs, if any, were ordered to filed by June 21, 1996; and (4) a hearing on Defendants' Motions for Summary Judgment was scheduled for June 28, 1996. Both Plaintiffs were present on the conference call. No disagreement was voiced by either of the Plaintiffs or their attorney regarding the briefing schedule set by the Court. Additionally, during the May 3, 1996, conference call, Attorney Oreskovich raised the possibility of withdrawing from the case, though she did not make a formal request at that time.

On May 24, 1996, Defendant Fairbanks filed his Motion for Summary Judgment and Motion for Sanctions and terms. On June 5, 1996, Defendant Our Lady of Lourdes filed its motion for Sanctions and Terms.

On June 6, 1996, Attorney Oreskovich filed a Motion to Withdraw as attorney for the Plaintiffs. On June 13, 1996, Attorney Oreskovich, on behalf of plaintiffs, filed a Motion to Continue the Summary Judgment hearing.

On June 20, 1996, the court held a third telephonic status conference. At the hearing, the Plaintiffs informed the court of the possibility that Attorney Joseph Dunn would enter the case to assist Nancy Oreskovich. The court denied Attorney Oreskovich's Motion to Withdraw,[2] but granted Plaintiffs' Motion for a continuance of the summary judgment proceedings. The court ordered Attorney Oreskovich to meet with attorney Joseph Dunn and the Plaintiffs to discuss the possibility of Mr. Dunn acting as co-counsel in the case.

A fourth telephonic conference was held on June 28, 1996. At the hearing, the Court ordered a stay of 60 days to allow Mr. Dunn additional time to determine whether he wished to represent the Plaintiffs. During the stay, the Court ordered that no additional discovery be conducted. Further, the Court ordered Attorney Oreskovich to continue preparation of a response to the Defendants' Motions for Summary Judgment. The Court ordered the Plaintiffs to file their responses to the Defendants' motions for summary judgment no later than September 13, 1996, and indicated that late filings would not be accepted.

On August 20, 1996, Attorney Oreskovich filed a second motion to withdraw as attorney for the Plaintiffs. On August 21, 1996, the Court received a letter from attorney Joseph Dunn informing the court that he did not wish to represent the Plaintiffs in this case.

2. Attorney Oreskovich's initial Motion to Withdraw was denied on the grounds that possible association with Attorney Joe Dunn would render the motion moot and on the additional grounds that withdrawal by Attorney Oreskovich at that point in the proceedings would detrimentally affect the interests of her clients given that a briefing schedule had been established for Defendants' summary judgment motions.

A fifth telephonic status conference was held on September 3, 1996. The court denied Attorney Oreskovich's second Motion to Withdraw.[3] The court again ordered Plaintiffs to file their response to Defendants' Motions for Summary Judgment no later than September 13, 1996, and again indicated that late filings would not be accepted. The court lifted the stay on discovery.

Following the September 3, 1996 conference, Attorney Oreskovich, on behalf of the Plaintiffs, requested a second continuance of six weeks in order to respond to Defendants' summary judgment motions. On September 9, 1996, the court granted Plaintiffs a two week extension to file their responses, and once again indicated that late filings would not be accepted.

On September 26, 1996, one day before Plaintiffs' response to Defendants' summary judgment motions was due, Attorney Oreskovich filed a third motion for continuance pursuant to Rule 56(f). On September 30, 1996, the court granted Plaintiffs' Motion for Continuance, but only for a period of three days.[4] On September 30,

[3] Attorney Oreskovich's second Motion to Withdraw was denied on the grounds that it was untimely given the pending deadline for Plaintiffs' response to Defendants' summary judgment motions.

[4] In Plaintiffs' Rule 59(e) Motion for reconsideration filed on November 8, 1996, attorney Oreskovich asserted that this court had failed to decide her Rule 56(f) Motion for Continuance filed on September 26, 1996. Attorney Oreskovich contended that the failure to decide the Rule 56(f) Motion was a 'manifest error of law.' Despite Attorney Oreskovich's contentions, on October 2, 1996, this court granted Plaintiffs' request for a 56(f) continuance for a period of three days. Order filed October 2, 1996 (Ct. Rec. 43)

1996, Attorney Oreskovich, on behalf of the Plaintiffs, filed a Memorandum of Law opposing Defendants' motions for summary judgment. Plaintiffs' counsel appended a loose assortment of documents, many of which were entirely illegible, in support of Plaintiffs' summary judgment response. Additionally, none of the evidentiary materials offered by Plaintiffs' counsel were identified or authenticated as required by Federal R.Evid. 901 and Fed.R.Civ.P. 56(e). Further, individual statements were not presented in proper affidavit or declaration form as required by Fed.R.Civ.P. 56(e). Thus, none of the materials were admissible or useable at trial and could not be properly

4. Ordinarily, a Rule 56(f) motion would be granted for a period longer than three days. It is clear, however, that the 'burden is on the party seeking to conduct additional discovery to put forth sufficient facts to show that the evidence sought exists.' *Volk v. D.A. Davidson & Co,* 816 F.2d 1406, 1416 (9th Cir. 1987) Further, the district court'does not abuse it's discretion by denying further discovery if the movant has failed diligently to pursue discovery in the past.' *Conkle v. Jeong,* 73 F.3d 909, 914 (9th Cir. 1995), cert denied sub nom. *Conkle v. U.S. Court of Appeals for Ninth Circuit,* 117 S.Ct. 56 (1996). Stated differently, the Ninth Circuit has indicated that it will only find that the district court abused it's discretion 'if the movant diligently pursued it's previous discovery opportunities, and if the movant can show how allowing additional discovery would have precluded summary judgment.' *Qualls v. Blue Cross of California,* 22 F.3d 839, 844 (9th Cir. 1994)(emphasis in original)(citation omitted) In this case, Plaintiffs' Rule 56(f) Motion clearly failed to meet the above criteria.

considered by the court in deciding the motions for summary judgment.[5]

Upon receiving Plaintiffs' responsive pleading, the court reviewed all summary judgment materials submitted by the parties. On October 25, 1996, the Plaintiffs conducted a hearing by telephone to consider the parties' arguments for and against summary judgment. In the pleadings filed on Septtember 30, 1996 and at oral argument, counsel for Plaintiffs failed to raise any material issue of fact and failed completely to produce any evidence whatsoever indicating that either of the Defendants ever injected Hayes with radioactive material. Accordingly, the court granted both Defendants' Motions for summary judgment. The court reserved ruling on Defendants' Motions for Sanctions and Terms until November 26, 1996, and ordered the parties to submit additional materials. A briefing schedule was set out to allow Attorney Oreskovich an opportunity to respond to the materials. Oreskovich, however, never filed a response.

ANALYSIS

Rule 11 Sanctions. Under Fed.R.Civ.P. 11, an attorney, by signing any motion or pleading and presenting it to a federal court, warrants that the pleading 'is well-grounded

[5] On or about October 1, 1996, a member of this court's staff spoke with attorney Oreskovich and informed her that she needed to provide the court with legible copies of the exhibits offered to support the summary judgment response. Additionally, the staff member requested that attorney Oreskovich tab the exhibits so that the court could reference the materials referred to in the summary judgment response. Despite her promise that she would respond to the court's concerns, attorney Oreskovich never provided the court with a modified pleading.

in fact, that it is warranted by existing law or a good faith argument for an extension, modification or reversal of existing law, and that it is not filed for an improper purpose.' *West Coast Theater Corp. v. City of Portland,* 897 F.2d 1519, 1526 (9th Cir. 1990)(citing *Golden Eagle Distributing Corp. v. Burroughs Corp,* 801 F.2d 1531, 1536 (9th Cir. 1986) Upon finding that a party has breached any of the warranties, the court may impose sanctions. Fed.R.Civ.P. 11(c)

Ordinarily, Rule 11 sanctions 'attach only on the basis of the attorney's signature on the pleadings' while Sec. 1927 sanctions are available for later proceedings. *West Coast Theater Corp,* 897 F.2d at 1528. While Rule 11 sanctions ordinarily attach at the time of the filing of a pleading, there is support for this court's imposition of Rule 11 sanctions based on the costs and fees incurred by the Defendants after the filing of summary judgment pleadings. The court notes that 'a litigant's obligations with respect to the contents of (papers submitted to the court) are not measured solely as of the time they are filed with or submitted to the court, but include reaffirming to the court and advocating positions contained in those pleadings and motions after learning that they cease to have any merit.' Fed.R.Civ.P. 11 Advisory Committee's Note to 1993 Amendments.

As noted during the motions hearing, this court finds that the initial filing of the Complaint by Ms. Oreskovich was likely sanctionable based on the failure to investigate. This court, however, is willing to give Attorney Oreskovich the benefit of the doubt and find that the initial filing of the Complaint was not sanctionable. Indeed, the drafters of Rule 11 recognize that 'sometimes a litigant may have a good reason to believe that a fact is true or false but may need discovery, formal or informal, from opposing parties or third persons to gather and confirm the evidentiary basis for the allegation.' Id. The drafters, however, further note

that 'if evidentiary support is not obtained after a reasonable opportunity for further investigation or discovery, the party has a duty under the rule not to persist with that contention.' Id.

In this case, the court finds that a reasonable attorney would have recognized at the time that Defendants filed their summary judgment pleadings that Plaintiffs' case was devoid of any factual support. Under such circumstances, the attorney has a duty under Rule 11 to refrain from further advocacy of positions which have become patently frivolous. In this case, however, Attorney Oreskovich continued to pursue the serious claims alleged in the Complaint despite the absence of any evidence supporting the allegations.

Since the purpose of Rule 11 sanctions is to deter rather than to compensate, monetary penalties should ordinarily be paid to the court. Hpwever, given the unusual circumstances of this case, the court deems it appropriate to assess a portion of the Defendants' fees and costs directly to Attorney Oreskovich. In this case, Attorney Oreskovich requested, and was granted, three continuances to respond to Defendants' timely summary judgment motions. Pursuant to this court's order following the May 3, 1996, telephonic status conference, Plaintiffs' responses to Defendants' Motions for Summary Judgment were originally due on June 14, 1996. Attorney Oreskovich, however, requested three continuances which ultimately continued the response date to September 30, 1996. Despite prolonging the litigation for several months and denying the Defendants their right to have their summary judgment pleadings considered in a timely fashion, Attorney Oreskovich failed to provide this court with any evidence in support of the detailed allegations contained in the Complaint filed on October 12, 1995.

Attorney Oreskovich on behalf of the Plaintiffs, did ultimately submit a response to the summary judgment

pleadings on September 30, 1996. The shortcomings of these pleadings are discussed supra at 8-9. Thus, despite Attorney Oreskovich's assertions that the additional time granted her by this court would allow her to respond properly to the summary judgment pleadings, Attorney Oreskovich failed completely to file with this court a response whcih raised any issue of material fact or indicated that there was any merit to the Complaint signed and filed by her on October 14, 1995.

The summary judgment response filed by Attorney oreskovich demonstrates that the original Complaint was neither well grounded in facts, warranted by exisitng law, nor justified by any good faith argument for the extension or reversal of existing law. Indeed, the pleading confirms that the Complaint filed on October 12, 1995, was entirely devoid of factual support, and was comprised entirely of speculation and conjecture.

In these circumstances, the court finds Rule 11 sanctions appropriate. Further, the court finds that the appropriate amount of sanctions consists of Defendants' fees and costs incurred after the filing of their summary judgment motions.

29 U.S.C. Sec 1927 Sanctions. Rule 11 is not the only authority for imposing sanctions. Under 28 U.S.C. 1927;

> Any attorney or other person admitted to conduct cases in any court of the United States or any territory thereof who so multiplies the proceedings in any case unreasonably and vexaciously may be required by the court to satisfy personally the excess costs, expenses, and attorneys fees reasonably incurred because of such conduct.

To impose Sec. 127 sanctions, the court must make a finding of bad faith. *West Coast Theater Corp,* 897 F.2d at 1528. Bad faith is defined as 'when an attorney knowingly or recklessly raises a frivolous argument, or argues a

meritorious claim for the purpose of harassing an opponent.' Id.(citations omitted)

Whereas Rule 11 sanctions ordinarily attach on the basis of the attorneys signature on the pleadings, Sec. 1927 sanctions are available for an attorney's conduct at later stages of the litigation. See *West Coast Theater Corp,* 879 F.2d 897 F.2d at 1528; *Cunningham v. County of Los Angeles,* 879 F.2d 481, 490 (9th Cir. 1988), cert denied 493 U.S. 1035 (1990)

In this case, Attorney Oreskovich recklessly pursued the claims against the Defendants even after it became clear that no evidence existed to support the Plaintiffs' claims. Such recklessness constitutes bad faith for purposes of applying Sec. 1927 sanctions. Accordingly, this court concludes that Sec. 1927 provides an alternate basis for imposing costs and fees incurred by Defendants after the filing of summary judgment motions as sanctions. Accordingly,

IT IS ORDERED that:

1. Defendant Fairbanks' Motion for Sanctions, Ct. Rec. 22, is GRANTED. Attorney Oreskovich shall remit to Defendant fairbanks the costs and fees incurred by Defendant Fairbanks after the filing of Fairbank's motion for summary judgment, less the amount spent by Defendant Fairbanks in preparing the motion for sanctions and terms. Pursuant to the materials submitted by Defenant Fairbanks, these costs and fees amount to $5,377.64.

2. Defendant Our Lady of Lourdes motion for sanctions and terms, Ct. Rec. 26, is GRANTED. Attorney Oreskovich shall remit to Defendant Our Lady of Lourdes the costs and fees incurred by Defendant Our Lady of Lourdes after the filing of Our Lady of Lourdes motion for summary judgment, less the amount spent by Defendant Our Lady of Lourdes in preparing the motion for sanctions and terms. Pursuant to the materials submitted by Defendant Our Lady of Lourdes, these costs and fees amount to $7,954.81.

The Clekr is directed to (a) file this order and provide copies to counsel and to the Plaintiffs; (b) ENTER JUDGMENT as set out above; and (c) close this file.

DATED this 10th day of December, 1996.

/signed/
Wm. Fremming Nielsen
Chief United States District Judge